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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD LOUIS O'ROY,

Defendant and Appellant.

C040993

(Super. Ct. No.
00F02788)

A jury convicted defendant Donald Louis O'Roy of battery resulting in serious bodily injury (Pen. Code, § 243, subd. (d); undesignated section references are to this code; count two) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count three). In connection with count three, the jury found that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The jury acquitted defendant of robbery (§ 211; count one). In bifurcated proceedings, the court found defendant sane on his not guilty by reason of insanity plea based on written reports of two doctors.

The court also found a strike prior [forcible rape (§ 261, subd. (a)(2))] (§§ 667, subds. (b)-(i), 1170.12) to be true.

Sentenced to state prison for an aggregate term of 11 years, defendant appeals, contending the trial court erred when it (1) did not order a hearing on defendant's competence to stand trial, (2) erroneously instructed the jury in the language of CALJIC No. 2.71 and (3) allowed evidence of the victim's good character in rebuttal. We will affirm.

FACTS

In 2000, the 69-year-old victim became the 46-year-old defendant's payee for Social Security checks. On March 7, 2000, defendant was visiting the victim. After a couple of hours, defendant asked for money for bus fare. The victim offered defendant some money but it was not enough. Defendant demanded \$50 for cab fare. For 30 minutes, defendant and the victim argued about money. As the victim started to leave the room, defendant grabbed him from behind, spun him around and punched him in the face with a closed fist. The victim fell to the floor where defendant continued to hit the victim and then choked the victim until he lost consciousness. When the victim regained consciousness, he proceeded to the bathroom, bleeding from his face. Defendant followed and again choked the victim who fell to the floor. Defendant demanded money and threatened to kill the victim's companion and her mother. The victim threw \$15 to the floor. Defendant took the money as well as the victim's glasses from his face and fled. Without his glasses,

the victim could not use the phone to call for help. The victim's companion arrived shortly thereafter.

The victim's injuries included a fractured sinus and right eye orbit, a face laceration, bruising on his right cheek, and pain in his chest and abdomen.

DISCUSSION

I

Defendant contends the trial court failed to order a hearing on his competence to stand trial thus denying his right to due process and his right to be present at trial. The record fails to demonstrate a reasonable doubt as to defendant's competence to stand trial, consequently, we find no error.

Background

On November 14, 2000, just as jury trial proceedings were scheduled to begin and after conducting and denying defendant's second motion to substitute counsel, the court declared a doubt as to defendant's competence to stand trial, after hearing "a certain amount of rambling" from defendant and counsel's declaration of doubt. The court suspended criminal proceedings and appointed two doctors to evaluate defendant in accordance with section 1368.

By December 19, 2000, the court had received evaluations from Drs. Ebert and Nakagawa who both opined defendant was competent. The parties submitted the issue and the court found defendant competent to stand trial. Defendant then was allowed to represent himself. Trial was set for January 31, 2001. Trial was reset at defendant's request to February 20, 2001, and

then reset again until March 6, 2001. On February 22, 2001, defendant's request for advisory counsel was denied and on March 6, 2001, defendant was not transported for trial because he was "on suicide watch." Defendant remained in the psychiatric unit of the jail. On April 6, 2001, defendant was present and trial was reset for May 14, 2001.

On May 8, 2001, defendant personally filed a motion to enter a plea of not guilty by reason of insanity (NGI). Defendant stated that he had attempted suicide while in jail.

On May 17 and 18, 2001, the court heard defendant's motion and denied it, finding no good cause for the delay. At the end of the hearing, defendant yelled at the judge, "[K]iss my ass" and "Fucking bitch." Defendant was removed from the courtroom for misconduct.

On June 22, 2001, defendant's pro per status was revoked and counsel was appointed at defendant's request. Defendant then entered pleas of not guilty and not guilty by reason of insanity. Doctors were appointed to evaluate whether defendant was sane and whether he was capable of distinguishing right from wrong at the time of the offenses. Dr. Shields filed an evaluation, answering both questions affirmatively.

Prior to the filing of the second doctor's report, on August 31, 2001, the court declared a doubt as to defendant's competence to stand trial based upon defense counsel's declaration. The court suspended criminal proceedings for evaluation of defendant under section 1368.

On October 23, 2001, Dr. Johnston filed his report, concluding that defendant was competent to stand trial. Despite defendant's angry outburst during the examination, Dr. Johnston concluded defendant was malingering and his conduct was a "product of characterological disturbance rather than mental illness, per se."

On November 30, 2001, just prior to the commencement of the proceedings, defendant exposed himself, urinated in the courtroom and was removed. The court received into evidence the evaluation of Dr. Johnston, the parties submitted the matter and the court found defendant competent to stand trial and reinstated criminal proceedings, setting trial for January 23, 2002.

On January 14, 2002, defendant was ordered shackled and, after interrupting and arguing with the judge, was removed from the courtroom.

On January 18, 2002, defendant complained that he was "not being treated fair[ly]. You don't listen to me. That's why I have been going off because no one listens to me." Defendant also claimed that his "rights" were violated when the same attorney was appointed to represent him after defendant had been successful on a motion to substitute counsel with respect to that attorney. After clarification on the record that the attorney was representing defendant with defendant's consent, defendant threatened to "spit on you, bitch." The court ordered a mask for defendant for his next appearance.

On January 23, 2002, the first day of trial, defendant sought substitution of counsel. Defendant explained that he "was acting stupid and silly and disrespectful to everybody because [defendant] was going out of [his] mind losing it, totally losing it" when the prosecutor objected to defendant having another attorney appointed. Defendant claimed that his attorney would not defend him and was "standing side by side" with the prosecutor which made defendant angry enough to urinate in the courtroom. Defendant blamed his attorney for all of defendant's antics in the courtroom. The court noted the "long and tortured history of failure to cooperate, failure to abide by courtroom standards of demeanor when present in the courtroom" as well as mental health evaluations and concluded that "the deterioration in the [attorney-client] relationship has been occasioned solely by [defendant's] willful recalcitrance and defiant attitude," denying the *Marsden* request. Defendant sought to retain counsel and the motion was denied as untimely.

A jury was selected on January 24, 2002.

After the weekend, on Monday, January 28, 2002, the court learned that defendant had "attempted to injure his wrist" the night before. The jail placed defendant on "suicide watch" even though his wrist had not bled. Defendant was present in the afternoon session, explaining he had received "tragic news." A jail psychiatrist expressed no opinion on defendant's competence to stand trial because he had not interviewed defendant for such purpose. The court questioned defendant. The court informed

defendant that it planned to go forward with the trial.

Defendant stated that he understood. The court asked whether defendant would be able to assist counsel. Defendant replied, "Oh, yes. No problem."

Analysis

Competence to stand trial has been defined as "a defendant's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."" (People v. Welch (1999) 20 Cal.4th 701, 737, (Welch) quoting Dusky v. United States (1960) 362 U.S. 402 [4 L.Ed.2d 824, 825], italics in original.)

Section 1367, subdivision (a) provides, in relevant part, as follows: "A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Section 1368 provides, in relevant part, as follows:

"(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably

necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.

"(b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. . . ."

"[E]ven though section 1368 is phrased in terms of whether a doubt arises in the mind of the trial judge and is then confirmed by defense counsel . . . [citation], once the accused has come forward with *substantial evidence* of incompetence to stand trial, due process *requires* that a full competence hearing be held as a matter of right. [Citation.] In that event, the trial judge has no discretion to exercise. [Citation.] . . . [S]ubstantial evidence of incompetence is sufficient to require a full competence hearing even if the evidence is in conflict. [Citation.] . . . [W]here the substantial evidence test is satisfied and a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed. [Citation.]" (*Welch, supra*, 20 Cal.4th at pp. 737-738, citing *Pate v. Robinson* (1966) 383 U.S. 375 [15 L.Ed.2d 815] and *People v. Stankewitz* (1982) 32 Cal.3d 80, *italics in original*; see also *People v. Lawley* (2002) 27 Cal.4th 102, 131, 136 (*Lawley*).)

"'Substantial evidence' has been defined as evidence that raises a reasonable doubt concerning the defendant's competence to stand trial." (*Welch, supra*, 20 Cal.4th at p. 738.)

"'[W]hen the evidence casting doubt on an accused's present sanity is less than substantial . . . only where doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal.' [Citation.]" (*Id.* at p. 740.) "When the evidence casting doubt on an accused's present competence is less than substantial, . . . [i]t is with the discretion of the trial judge whether to order a competence hearing" and "that 'more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation].' [Citation.]" (*Id.* at p. 742.)

"'When a competency hearing has already been held and defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding.'" [Citation.] A trial court may appropriately take into account its own observations in determining whether the defendant's mental state has

significantly changed during the course of trial. [Citation.]”
(*Lawley, supra*, 27 Cal.4th at p. 136.)

Here, neither the court nor counsel expressed a doubt as to defendant’s competence as a result of his unsuccessful attempt to injure his wrist. Defendant failed to present substantial evidence of his incompetence to stand trial. The record reflects that defendant *attempted* to injure his wrist and his wrist did not bleed. The fact that he was placed on suicide watch at the jail does not establish that he attempted suicide. In any event, a suicide attempt, without more, does not demonstrate that defendant’s mental state was such as to raise a reasonable doubt as to his competence to stand trial. (See *Drope v. Missouri* (1975) 420 U.S. 162, 180-181 [43 L.Ed.2d 103, 118-119]; see also *People v. Pennington* (1967) 66 Cal.2d 508, 512-515.) Further, defendant’s suicide attempt did not constitute a substantial change of circumstances or new evidence casting a serious doubt as to the prior finding that defendant was competent to stand trial. On January 18, 2002, just 10 days before the court learned defendant had futilely attempted to injure his wrist, defendant had expressed his dissatisfaction with counsel, explaining he was frustrated with the system and had been engaging in certain antics in retaliation. The court could reasonably conclude defendant’s attempt to injure his wrist was just one more antic. We find no abuse of discretion in the trial court’s conclusion that defendant failed to present substantial evidence to require a full competency hearing.

II

Over defense counsel's objection on the ground of lack of evidence, the trial court instructed the jury in the language of CALJIC No. 2.71 as follows:

"An admission is a statement made by the Defendant which does not by itself acknowledge his guilt of the crimes for which the Defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the Defendant made an admission and, if so, whether that statement is true in whole or in part. Evidence of an oral admission of the Defendant not made in court should be viewed with caution."

Defendant contends on appeal that his statements were not admissions, there was no question whether he actually made certain statements and the instruction undermined his defense. Notwithstanding that the instruction has been deemed beneficial to a defendant because it instructs the jury to view the evidence of an oral admission with caution (*People v. Frye* (1998) 18 Cal.4th 894, 958-959), he argues that his objection should have precluded its use.

In overruling defendant's objection to the instruction, the trial court noted there was evidence that after the crime, defendant threatened the victim if he reported the assault. Specifically, the victim testified defendant threatened to kill the victim's companion and her mother if the victim reported the physical assault to law enforcement. This out-of-court statement tends to prove defendant's guilt when considered with

the rest of the evidence. Defendant knew his actions were unlawful because there was no evidentiary support for self defense. “‘The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.’ [Citation.] This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) The trial court did not err in giving the cautionary instruction.

On appeal, defendant here chose to ignore the out-of-court statement cited by the trial court in response to defense counsel’s objection below. He also ignored the Attorney General’s briefing which here notes that trial court response. In his opening brief and again in his reply brief, defendant instead focused on his out-of-court denial of culpability, that is, his statement to detectives asserting the victim threatened defendant with a firearm and that defendant acted in self-defense. Because there was evidence supporting the instruction, we need not discuss defendant’s claim his out-of-court denial of culpability was not an admission.

III

Defendant contends the trial court prejudicially abused its discretion by admitting rebuttal evidence of the victim’s character for honesty. Defendant argues the evidence was inadmissible because he had not introduced evidence as to the victim’s bad character traits. Specifically, defendant argues, “Nothing in [defendant’s] testimony had constituted evidence of

[the victim's] character or traits of character to show conformity with that character on March 7. [Defendant] did not testify as to [the victim's] character trait for violence or reputation for dishonesty. He testified as to none of the acts that the prosecution moved to exclude during in limine motions. Hence, no testimony on [defendant's] part triggered the provision of subdivision (a)(2) of section 1103, allowing the alleged victim to rebut evidence of character offered by the defendant."

Background

Defendant testified the victim embezzled funds by withholding funds from defendant which belonged to defendant and gave some of defendant's funds to the victim's daughter. Contrary to the victim's claim he had refused payment for improvement work performed for his longtime friend Alfredo Carillo, defendant testified he saw Carillo pay cash to the victim. Defendant helped at Carillo's, working full days for three weeks and, according to the victim, would be paid half of the \$300 pay. Instead, defendant received only \$50. Defendant also testified he helped the victim at Brenda Knight's house for a full week, building a fence and pulling out rose bushes. Defendant was also hired alone to trim trees for Knight for \$800 to be paid directly. The victim said defendant would get paid less for the fence building because Knight was the victim's "girlfriend." Defendant claimed he never got paid for his labor and never finished the job. Defendant took paperwork to Knight later and asked for his money.

Over defense counsel's objection to reputation evidence, because the defense had presented none and, in addition, based Evidence Code section 352, the court granted the prosecution's motion to introduce the testimony of Carillo, in rebuttal. This was allowed to show no money passed between him and the victim, he paid defendant for two or three days work and, defendant returned on a later date asking to borrow money. The court granted the prosecutor's motion to introduce the testimony of Brenda Busskohl (Knight), in rebuttal, to show (1) the victim's character for truthfulness in the community, as opposed to specific acts of honesty, and to establish (2) the only work defendant performed involved palm trees for which she paid.

Busskohl (Knight) then testified the victim worked on her fence and she paid him directly. Sometimes defendant helped. Defendant did some work for her removing trees for which she paid defendant for work performed. The job was never completed by defendant and she had to hire someone else to complete it. Busskohl said she "never felt that [the victim] was dishonest or told [her] anything that wasn't the truth." She believed the victim was a truthful person based on the people who referred him to her and the people to whom she had referred the victim. On cross-examination, she admitted she did not know the victim's reputation for honesty and truthfulness in his own community.

Carillo also testified in rebuttal. The victim helped with some home improvements for Carillo, who paid the victim nothing in return. Defendant worked alongside the victim and was paid \$50 to \$60.

Analysis

Evidence Code section 1100 provides:

"Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."

Evidence Code section 1101 provides, in relevant part, as follows:

"(a) Except as provided in this section and in Sections . . . 1103, . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] . . . [¶]

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

Evidence Code section 1103 provides, in relevant part, as follows:

"(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

"(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

"(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

Evidence Code section 352 provides that the trial court may exclude evidence if its probative value is substantially outweighed by its prejudicial effect.

A trial court's ruling on the admissibility of evidence under Evidence Code section 352 will not be disturbed absent a showing of clear abuse of discretion. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.)

Defendant claimed the victim received payment from Carillo when the victim testified he had not. The prosecutor was entitled to introduce Carillo's testimony to support the victim's credibility. Defendant claimed he performed work for Knight (Busskohl) but was not paid for his labor. The prosecutor was entitled to rebut this with Knight's testimony to show she paid defendant for work performed. Although Knight was supposed to testify as to the victim's character for truthfulness in the community, presumably to rebut defendant's claim the victim had embezzled funds from defendant, Knight admitted she did not know the victim's reputation for honesty and truthfulness in the community, but only what she, and others for whom the victim worked, perceived to be his veracity. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P.J.

We concur:

RAYE, J.

HULL, J.